



DO NOT FILE COPY Redacted ORIGINAL

The CommLaw Group

HELEIN & MARASHLIAN, LLC
1483 Chain Bridge Road
Suite 301
McLean, Virginia 22101

Telephone: (703) 714-1300
Facsimile: (703) 714-1330
E-mail: mail@CommLawGroup.com
Website: www.CommLawGroup.com

Writer's Direct Dial Number
703-714-1301

Writer's E-mail Address
chh@CommLawGroup.com

April 13, 2009

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 - 12th Street, S.W.
Washington, D.C. 20554

FILED/ACCEPTED

APR 13 2009

Federal Communications Commission
Office of the Secretary

Re: inContact, Inc.
Form 499 Filer ID No. 818114
Petition for Special Relief and Waiver

06-122

Dear Secretary Dortch:

Enclosed please find an original and nine (9) copies of the "Public/Redacted" version of inContact, Inc.'s Petition for Special Relief and Waiver. Also enclosed is inContact's Request to Withhold Exhibit Materials from Public Inspection ("Request"). In accordance with inContact's Request, we are also filing herewith an original and nine (9) copies of the "Confidential" version of inContact, Inc.'s Petition for Special Relief and Waiver which contains inContact's confidential financial data. You will find at Exhibit 1 an identification of those pages of the Petition for Special Relief and Waiver that are subject to inContact's Request due to the confidential nature of the information contained therein.

An additional copy of this filing is also enclosed. Please date-stamp the copy and return in the postage-prepaid envelope provided. To the extent you have any questions concerning this submission, please do not hesitate to contact the undersigned.

Respectfully submitted,
inContact, Inc.

Charles H. Helein (sa)

Charles H. Helein
Helein & Marashlian, LLC
Its Attorneys

Enclosures

No. of Copies rec'd 0
List ABCDE

LSJ

FILED/ACCEPTED

APR 13 2009

Federal Communications Commission
Office of the Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
inContact, Inc.)
)
Petition for Special Relief and Waiver)
_____)

REQUEST TO WITHHOLD EXHIBIT
MATERIALS FROM PUBLIC INSPECTION

Pursuant to Section 0.459 of the Commission's Rules, inContact, Inc. ("Petitioner"), through undersigned counsel, respectfully requests that all materials submitted in Exhibit 1 related to the Petition for Special Relief and Waiver be withheld from Public Inspection. In support thereof, Petitioner provides the following justification:

(a) the materials to which this request applies are physically separated from the information to which the request does not apply.

(b) reasons for withholding materials inspection:

(1) **Identification of the specific information for which confidential treatment is sought:** confidential financial documentation (in the form of USAC invoices and other financial information relevant to the Commission's resolution of the issues raised in Petitioner's Petition for Special Relief and Waiver);

(2) **Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission:** In the Matter of inContact, Inc's Petition for Special Relief and Waiver

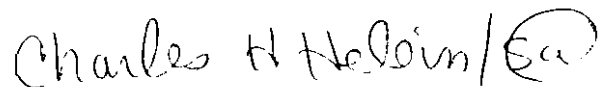
(3) **Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged:** Information concerning Petitioner's financial condition is extremely privileged and is never revealed to Petitioner's competitors or other third parties (except pursuant to binding Nondisclosure Agreements in cases of absolute business necessity).

(4) **Explanation of the degree to which the information concerns a service that is subject to competition:** Petitioner's confidential information is directly related to its financial condition; all services provided to and by Petitioner have been

deemed fully competitive and no reason exists that competitors or third parties would require, or be entitled to review, this information.

- (5) **Explanation of how disclosure of the information could result in substantial competitive harm:** Analysis of this information by Petitioner's competitors may lead to certain conclusions concerning the size of Petitioner's customer base; it may also lead to erroneous conclusions concerning Petitioner's overall financial viability which competitors must be precluded from disseminating in the marketplace.
- (6) **Identification of any measures taken by the submitting party to prevent unauthorized disclosure:** Petitioner has provided these confidential materials only to governmental entities which hold these materials in strict confidence. In the event Petitioner is required by business necessity to share this information with third parties, it does so only pursuant to Nondisclosure Agreements.
- (7) **Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties:** Except as noted above, this material is not available to third parties and is never available to the public.
- (8) **Justification of the period during which the submitting party asserts that material should not be available for public disclosure:** Petitioner respectfully submits that given the highly confidential nature of this information, the period of unavailability of this material for review must be perpetual.
- (9) **Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted:** In light of the above, Petitioner respectfully submits that this request to withhold Exhibit B materials from public inspection has been fully supported; accordingly, Petitioner's request for confidentiality should be granted.

Respectfully submitted,



Charles H. Helein
Jonathan S. Marashlian
Jackie R Hankins
Helein & Marashlian, LLC
1483 Chain Bridge Road, Suite 301
McLean, Virginia 22101
Tel: 703-714-1313
Fax: 703-714-1330
E-mail: jsm@CommLawGroup.com

April 13, 2009

Counsel for inContact, Inc.

Exhibit 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
inContact, Inc.)
Form 499 Filer ID No. 818114)
Petition for Special Relief and Waiver)

PETITION FOR SPECIAL RELIEF AND WAIVER

I. INTRODUCTION

On January 23, 2009 the Universal Service Administrative Company (“USAC”) invoiced inContact, Inc.¹ (“Petitioner”) for [REDACTED] in additional Universal Service Fund (“USF”) contributions based on recalculated 2004 499-A true-up adjustments. USAC apparently made this recalculated adjustment because of its recent discovery of a miscalculation in its earlier true-up of Petitioner’s 2003 revenues, which took place in 2004. As a matter of law, Petitioner is not liable for any further contributions based on its 2003 revenues and therefore cannot be required to pay the [REDACTED] in true-up adjustments recently invoiced by USAC.

The Federal default statute of limitations establishes a four-year limitation period for the filing of suits on any claim arising under any Federal statute adopted after 1990 that does not itself contain an explicit limitation period. Because USAC’s imposition of the true-up charges upon Petitioner stems from authority delegated pursuant to Section 254 of the Telecommunications Act of 1996 (“Telecom Act”), USAC’s recent true-up assessment is barred by the four-year limitation period. USAC’s January 2009 assessment is likewise barred by Section 254’s prohibition against unfair and discriminatory assessments and the common law doctrines of equitable estoppel and

¹ Petitioner previously operated under the name of UCN, Inc. and prior to that as Buyers United, Inc. In January 2009, the company changed its name to inContact, Inc.

laches. Furthermore, Commission enforcement of USAC's time-barred assessment would be arbitrary and capricious, *ultra vires*, and a constitutionally impermissible infringement upon Petitioner's due process guarantees.

For the reasons discussed herein, Petitioner respectfully petitions the Commission to find USAC's January 2009 further true-up billing untimely, as a matter of law, and instruct USAC to remove such amounts from any future USAC invoice.² In addition, Petitioner files contemporaneously the attached request for Waiver of penalties and fees and seeks the Commission's confirmation that Petitioner has a right to dispute the assessment without first appealing to USAC.

II. BACKGROUND

Petitioner began in 1997 as a reseller of telecommunication services. Having completed a series of strategic acquisitions, commencing in 2004, Petitioner offered a new integrated product line that combines a national Voice over IP ("VoIP") network with hosted, proprietary software applications for handling and managing the marketing, survey, sales, and related general public and customer contact needs of commercial enterprises.³

A. Universal Service Fund Reporting and Contribution Obligations

In 1997, the FCC issued the Universal Service Order to implement provisions of the Telecom Act relating to the preservation and advancement of universal telephone service.⁴ The Universal Service Order requires telecommunications service providers providing interstate services

² The Commission should likewise declare unlawful any fees or contributions calculated based upon the retail interstate telecommunications revenue reported in Petitioner's 2004 Form 499-A.

³ Petitioner's transformation from a traditional telephony provider to providing Software as a Service ("SaaS") over enhanced communications networks is continuing. inContact's SaaS offering is comprised of hosted, on-demand contact handling software solutions and business communications services, delivered over the company's national VoIP network. The inContact suite of hosted contact center solutions is also available through third-party connectivity options.

⁴ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, FCC 97-157 (rel. May 8, 1997).

to periodically contribute to the universal service support program referred to as the Universal Service Fund or USF. Monthly contributions to the USF are calculated based on the determination made by the FCC's designated private agent, the Universal Service Administration Corporation or USAC, of the total amount of the subsidy required to fund universal service needs for any given year. USAC determines each telecommunications service provider's contribution based on its total defined interstate and international end user telecommunications revenues, including interconnected VoIP revenue, reported to the FCC on its "Form 499s."

FCC Rules require telecommunications carriers to file with USAC - by April 1st of each year – an annual Telecommunications Reporting Worksheet Form 499-A (Form 499-A) for the previous year based on actual revenue data.⁵ Unless they meet the Section 54.708 *de minimis* exemption, carriers also are required to file quarterly revenue estimates via Telecommunications Reporting Worksheet Form 499-Q (Form 499-Q). Whereas the quarterly-filed Form 499-Q is a forward-looking worksheet that assesses a carrier's monthly universal service obligations based on estimates for the upcoming quarter, the annually-filed Form 499-A looks backward and is used by USAC in conducting its "annual true up" of the carrier's USF contributions based on actual data from the previous calendar year.⁶

B. USAC's True-up of Petitioner's USF Contributions for 2003

Throughout 2003, Petitioner filed timely quarterly reports (Forms 499-Q) estimating revenue projections. On or before April 1, 2004, Petitioner filed its 499-A worksheet that notified USAC of Petitioner's actual revenue data for 2003.⁷ After receiving Petitioner's Form 499-A, USAC compared Petitioner's projections against its actual reported revenues. Known as a "true-up," this

⁵ See 47 C.F.R. §§ 54.706, 54.711, and 54.713.

⁶ See Instructions to Form 499-A and 499-Q.

⁷ The factual statements in this Petition are supported by the attached Declaration of Paul Jarman, inContact's Chief Executive Officer.

process aims to conform actual with projected revenues.⁸ Because contribution factors vary quarterly, USAC uses an average contribution factor, calculated based upon whether a contributor's actual receipts are less than, equal to or exceed projected revenues.⁹ Thereafter, USAC refunds any overpayment or collects additional fees for any underpayment. Based on Petitioner's 2004 true-up, in mid-2004, USAC determined that Petitioner owed an additional [REDACTED], due in three monthly installments of [REDACTED] per month. These true-up charges were reflected on USAC invoices from July through September 2004.¹⁰ The September 2004 invoice was the final invoice assessing true-up adjustments for Petitioner's USF contributions based on 2003 revenues, with payment expressly made due on October 15, 2004.¹¹ Petitioner timely paid the total amount billed as 2004 499-A true-up adjustments, as set forth in the USAC September 2004 invoice.

On January 23, 2009, nearly five-years after its April 1, 2004 Form 499-A filing, USAC invoiced Petitioner for an additional [REDACTED] in true-up adjustments based on its 2003 revenues ("January 2009 Invoice").¹² USAC alleged that this belated assessment resulted from a miscalculation in conducting Petitioner's original 2004 true-up.

⁸ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, CC Docket No. 98-171, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, CC Docket No. 92-237, NSD File No. L-00-72, Number Resource Optimization, CC Docket No. 99-200, Telephone Number Portability, CC Docket No. 95-116, Report and Order, 67 Fed. Reg. 79525 (2002).

⁹ See, e.g. USAC website 2008 A/Q True Up Calculation Explanation, available at <http://www.universalservice.org/fund-administration/contributors/who-must-contribute/2008-aq-true-up.aspx>.

¹⁰ See USAC invoices from July through September 2004, attached hereto as **Exhibit A**.

¹¹ See *Id.*

¹² This amount is in addition to the [REDACTED] in 2003 true-ups Petitioner paid in 2004.

III. ARGUMENT

A. USAC's January 2009 Invoice Is Barred By The Federal Statute Of Limitations

USAC's assessment is time-barred by the Federal "default" Statute of Limitations ("Federal SOL").¹³ This four-year limitation period applies to all claims arising under an Act of Congress promulgated after December 1, 1990 for which no other limitation period is specified.¹⁴

The Telecommunications Act, enacted by Congress in 1996 (the "Act"), includes no time limitation for actions brought by or against the Commission.¹⁵ As a result, the Federal SOL clearly applies to the Act, and Courts have found the same.¹⁶ This application likewise affects claims arising under Section 254 of the Act, including claims regarding the Commission's USF regulatory scheme, promulgated there under.¹⁷

¹³ 28 U.S.C. § 1658(a); *Verizon New England, Inc. v New Hampshire Public Utils. Comm'n*, 2005 WL 1984452, *5 n.5 (D.N.H. 2005), citing *Pepepscot Indus. Park, Inc. v Maine Cent. R.R. Co.*, 215 F.3d 195, 203 n.5 (1st Cir. 2000) ("Absent the existence of an explicit limitations period, civil claims that arise under federal statutes enacted after December 1, 1990 are subject to 28 U.S.C. § 1658(a) which imposes a four-year limitations period on such actions."); *North Star Steel Co. v Thomas*, 515 U.S. 29, 34 n.1 (1995) (describing section 1658 as a "general, 4-year limitations period for any federal statute [enacted after Dec. 1, 1990] without one of its own"); *Campbell v Amtrak*, 163 F. Supp. 2d 19, 22 (D.D.C. 2001) (describing section 1658 as the "federal default statute of limitations").

¹⁴ *Id.* Note that the statute applies to actions brought by a federal agency. See, e.g. *Reich v Sea Sprite Boat Co.*, 50 F.3d 413, 417 (7th Cir. 1995) (finding an action brought by secretary of labor against private company within the four year statute of limitations under 28 U.S.C. § 1658); *SEC v Buntrock, Fed. Sec. L. Rep. (CCH) P92, 833* (N.D. Ill. 2004) (applying the four year statute of limitations under 28 U.S.C. § 1658 to an action by the SEC under the Private Securities Litigation Reform Act).

¹⁵ See, e.g. 47 U.S.C. §§ 151 et seq.; 47 C.F.R. §§ 0.1 et seq.

¹⁶ See, e.g. *City of Rancho Palos Verdes v Abrams*, 544 U.S. 113, 124 n.5 (2005) ("Since the claim here rests upon violation of the post-1990 TCA [the 1996 Act], § 1658 would seem to apply."); *Esquire Comm's. Co., Inc. v Baca*, 269 F. Supp. 2d 1310, 1320 (D.N.M. 2003) ("Because the Telecommunications Act was enacted after December 1, 1990, the four-year statute of limitations applies to the claims under the federal Telecommunications Act."); *Verizon Maryland Inc. v RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 552-54 (D. Md. 2002); *Bell Atlantic-Pennsylvania, Inc. v Pennsylvania Pub. Utils. Comm'n*, 107 F. Supp. 2d 653, 668 (E.D. Pa. 2000); *MCI Telecomms. Corp. v Illinois Bell Tel. Co.*, 1998 WL 156674, *3-*5 (N.D. Ill. 1998).

¹⁷ *Id.*

USAC's imposition of true-up charges on Petitioner stems from authority delegated to USAC by the Commission, pursuant to Section 254. USAC's true-up assessments are, therefore, subject to the Federal SOL.¹⁸

Application of the Federal SOL extinguishes Petitioner's liability for the 2004 499-A true-up adjustments set forth on USAC's January 2009 Invoice. The supportive facts are these:

- For 2003, Petitioner timely filed its quarterly Form 499-Q projecting its 2003 revenue;
- On or before April 1, 2004, Petitioner timely filed its annual Form 499-A, reporting actual revenue for 2003;
- Petitioner's Form 499-A provided USAC with all the facts necessary to properly calculate Petitioner's total USF contributions for 2003;
- In 2004, USAC true-up Petitioner's USF contribution for 2003 revenue by assessing an additional [REDACTED] in USF contributions, payable in three equal installments of [REDACTED] in July, August, and September 2004;
- The installment payments on the additional USF contributions of [REDACTED] were due August 15, September 15 and October 15, 2004, respectively;
- The applicable time period for collection of the debt accrued when the debt was due and payable,¹⁹ which was October 15, 2004, according to the September 2004 invoice – the last invoice on which 2003 true-ups were billed by USAC;
- Petitioner timely paid all USF contributions on 2003 revenue, including true-ups;
- Prior to January 23, 2009, when it slipped the additional [REDACTED] true-up into the Petitioner's monthly invoice, USAC never once contacted Petitioner or otherwise sought additional information relating to Petitioner's 2004 Form 499-A filing or USF contributions for 2003.

Like all statutes of limitations, the Federal SOL begins to run when it is known or should be known that a claim arises.²⁰ USAC had the same information in 2004 that it used once again either

¹⁸ See, e.g. 47 U.S.C. § 254.

¹⁹ See, e.g. *Southern Surety Co. v. Austin*, 22 F.2d 881, 882 (5th Cir. 1927) (“A cause of action accrues when the debt is due and suit may be brought on it.”).

²⁰ *Id.*

in late 2008 or early January 2009 when it recalculated Petitioner's 2003 USF contributions for the second time, thereby resulting in the [REDACTED] true-up charges in Petitioner's January 23, 2009 invoice. That is, upon receipt of Petitioner's 2004 Form 499-A, USAC had all the facts and data needed to properly calculate Petitioner's USF contributions on its 2003 revenues. It is therefore undeniable that USAC had the information needed to support a claim for additional contributions way back in 2004, when it processed the initial true-up assessment. Because USAC's January 23, 2009 invoice came months after October 14, 2008, a date that is more than four (4) years after the initial true-up assessments became due and payable, as a matter of law, USAC is statutorily barred from pursuing its claim.²¹

Statutes of limitations serve the public good by prohibiting stale claims and preventing resulting harm. With the passage of time, evidence is no longer available to prove or disprove a claim.²² Triers of fact would be hard pressed to make reliable determinations in the absence of current records, uncertain recollections and the lack of knowledgeable witnesses. Simply put, the due process rights of those against which stale claims are made, such as the Petitioner, are placed in such jeopardy as to require their nullification. Indeed, as explained below, Petitioner has been sorely disadvantaged by USAC's dilatoriness.

B. USAC May Not Audit Contributors After the Expiration of the Document Retention Period

Under the Commission's rules in effect in 2004, Petitioner was required to retain documents in support of its Form 449-Q and Form 499-A filings for a period of only three (3) years.²³ In 2007,

²¹ *Id.*

²² The purpose of statutes of limitations is to prevent surprises 'through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' *Order of Railroad Telegraphers v Railway Express Agency*, 321 U.S. 342, 348-349 (1944).

²³ See 47 C.F.R. §54.711(a), *Contributor reporting requirements*: Contributors shall maintain records and documentation to justify information reported in the Telecommunications Reporting Worksheet,

the Commission extended this three-year document retention period to five (5) years.²⁴ However, the Commission's 2007 *Report and Order* establishing the five-year document retention period is prospective in application.²⁵ Therefore, Petitioner no longer has any records relating to its 2004 Form 499-A filing and no documents with which to mount a defense to USAC's dilatory claim.

Petitioner's retention policy in 2003-2004 complied with the Commission's three-year retention rules applicable to the relevant time period. Because Petitioner no longer maintains records supportive of its 2003 revenue reporting, Petitioner lacks the ability to defend itself and is highly prejudiced by its rightful inability to produce documents which may rebut USAC's time-barred billing. This fundamentally unfair and prejudicial situation is precisely why statutes of limitations are enacted, why record retention rules are adopted, and why fundamental notions of due process forbid the prosecution of stale claims.²⁶

including the methodology used to determine projections, for three years and shall provide such records and documentation to the Commission or the Administrator upon request.

²⁴ *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Rural Health Care Support Mechanism; Lifeline and Link-Up; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, 22 F.C.C.R. 16372, 16412 (2007) ("2007 *Report and Order*").

²⁵ The 2007 *Report and Order* did not authorize retroactive application of the five-year document retention policy. As a consequence, USAC lacks the authority to calculate contributions that can only be verified, if at all, with financial and other records which no longer exist due to the expiration of the document retention period applicable to the subject timeframe. USAC is an administrative body without interpretative powers. See, *In re InComnet v. Post-Confirmation Committee of Unsecured Creditors of InComnet Communications Corp.*, 463 F.3d 1064 (9th Cir. 2006); 47 C.F.R. § 54.719(c). Indeed, "USAC's function under the revised structure will be exclusively administrative." Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 F.C.C.R. 25,058, 25,067 (1998). Moreover, prior to the enactment of the five-year period, the three-year document retention requirement was routinely enforced by the Commission's Enforcement Bureau. See e.g., *In the Matter of Communications Options, Inc.*, Notice of Apparent Liability for Forfeiture (Rel. July 27, 2007), EB-06-IH-2307 (the Enforcement Bureau, relying on Section 54.711(a)'s three year retention requirement sought fines against a contributor citing the importance of the recordkeeping requirements to ensure contributors correctly complete their Worksheets).

²⁶ The "audit period" is akin to a statute of limitations as it restricts the duration of the Commission's enforcement authority. See Ballentine's Law Dictionary (3d ed. 1969) (defining a

C. The Administrative Limitations Period Mirrors the Applicable Three-Year Document Retention Period

The justification for extending the document retention period to five-years in 2007 rested on the linkage between the retention period and the limitations period for administrative audits.²⁷ That is, the Commission expanded its document retention policy to conform to its audit policy, recognizing the importance of the document retention policy as a limitation on USAC's audit authority. While the adopting Order clarifies the limits of USAC's audit authority prospectively, it fails to impose a retroactive audit period, merely recognizing the need to synthesize its audit and document retention rules.²⁸ This analysis further supports the conclusion that Petitioner's adherence to the document retention policy absolves any liability for belated assessments.

Further, the FCC's rationale for lengthening its document retention period highlights the importance of ensuring certainty and consistency in the contribution process. The Commission emphasized the importance of a consistent policy on the limitations period for administrative review and the need for a policy that provides participants and contributors with some certainty of the time

statute of limitations/limitation on action as "prescribing the period of time within which an action or proceeding in law or in equity...[or] a criminal prosecution must be commenced.")

²⁷ In extending the document retention period, the Commission explained that contributors must: "retain all documents and records that they may require to demonstrate to auditors that their contributions were made in compliance with the program rules, assuming that the audits are conducted within five years of such contribution." *2007 Report and Order* (emphasis added).

²⁸ At no time did the FCC assert the right or intention to apply the policy retroactively. See *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration and Oversight, Federal State Joint Board on Universal Service, Schools and Libraries Universal Support Mechanism, Rural Healthcare Support Mechanism, Lifeline and Linkup, and Changes to the Board of Directors for the National Exchange Carriers Ass'n*, FCC 07-150, Report and Order, Rel. Aug. 29, 2007. A statute may not be retroactively applied unless the legislature specifically authorizes the retroactive application and the retroactivity of the limitations period is clearly stated. See *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994); *United States v. St. Louis, S. F. & T. R. Co.*, 270 U.S. 1, 3 (1926). Statutes of limitations in particular may not be retroactively applied where the result is to revive a stale claim. *In re ADC Telecom., Inc. Sec. Litig.*, 409 F.3d 974, 977 (8th Cir. 2005). Note also that USAC is expressly prohibited from making policy or interpreting statutory directives and is therefore unauthorized to interpret an FCC policy to invoke retroactive application. 47 C.F.R. § 54.702.

within which an audit or further review may occur.²⁹ This recognition of the power of the document retention period validates Petitioner's reliance there upon to refute USAC's assessment. Not only is the assessment unlawful as a violation of due process, but it directly contradicts the FCC's interpretation of the document retention policy as an indicator of USAC's auditing authority.

Finally, in the adopting Order, the Commission clarified that the administrative limitations period was not a statute of limitations for pursuing enforcement action or prosecuting a service provider or beneficiary.³⁰ Thus, while the audit policy offers document retention and prospective assessment guidelines, it fails to preempt the default federal statute of limitations which operates to nullify Petitioner's 2009 invoice.

D. Equity Mandates a Finding that USAC's January 2009 Billing is Untimely

Principles of equity offer additional compelling support that USAC's January 2009 billing is unenforceable. USAC's untimely assessment contradicts the equitable mandates of the universal service rules. In imposing USF contribution obligations, the Commission is limited by the Communications Act which expressly commands assessments be imposed in a non-discriminatory, equitable, and predictable manner.³¹ USAC's January 2009 billing is wholly inconsistent with each of these prescriptions.

It bears repeating that the impedance to its *second* true-up billing was USAC's own failure to accurately assess contribution obligations during the initial, 2004 true-up process. The Petitioner did

²⁹ See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808 (2004) ("*Schools and Libraries Fifth Report and Order*") (where the Commission aptly recognized that conducting inquiries within five years struck an "appropriate balance between preserving the Commission's fiduciary duty to protect the fund against waste, fraud and abuse and the beneficiaries' need for certainty and closure...").

³⁰ In setting an administrative limitations period that matched the newly adopted five year document retention period, and by emphasizing that it was not a statute of limitations period for purposes of bring legal action, the Commission recognized that it had no authority to ignore the Federal SOL' 4 year period of limitations. Even if argued that it intended no such recognition, the point is moot because the Commission has no authority to override statutory provisions.

³¹ 47 U.S.C. § 254(b)(4)-(5).

nothing wrong. USAC possessed the data upon which the second true-up is based since 2004. USAC's belated attempt to rectify its oversight, more than five years after the fact, is fundamentally unfair, unduly prejudicial, and inherently unreasonable:

- Unfair, because the Petitioner had a right to align its document retention policies with FCC Rules and policies applicable to the time period in question and it should not be penalized for its reliance;
- Unduly prejudicial, because as compared to all other contributors that received true-up assessments in a timely manner in 2004 and who were otherwise provided an opportunity to produce records in defense of potentially inaccurate assessments, USAC seeks to collect from Petitioner five years after the fact and long after evidence was irretrievably lost; and
- Unreasonable, for all these reasons and because, as a matter of law, USAC is time-barred.

Sections 201 and 202 of the Act prohibit carriers from engaging in unreasonable practices and undue discrimination. While USAC is not a carrier, it is hardly seemly to suggest that the Commission should allow its agent to engage in conduct Congress has ordered the Commission, itself, to prevent and penalize.

Moreover, to permit USAC's collection of belatedly assessed USF contributions given these circumstances would do violence to Section 254's predictability directive. It would take an astounding act of mental gymnastics to find "predictable" the assessment of contributions that are: (i) first calculated after five long years have passed, (ii) after the completion of a normal true-up process that occurred five years previously, (iii) after full payment of contributions made based on the true-up process completed five years previously, and (iv) after the Commission expressly provided -- three years after the fact -- that its new five-year record retention period was not also a limitation period on USAC's ability to assess true-ups. USAC's conduct is the epitome of *un*-predictability. Left unchecked, such conduct could destabilize the USF program by creating uncertainty among the thousands of contributors who may begin to wonder if, they too, might

receive a crippling USF true-up assessment years after the fact. Contrarily, informing USAC of its lack of authority to collect the [REDACTED] contribution invoiced in 2009 and based upon 2003 revenue would have absolutely no impact on the stability and predictability of the Universal Service Fund as the revenue was intended to support universal telephone service during the expired 2003 calendar year.

E. USAC's Conduct Violates Petitioner's Due Process Rights

Due process, at a minimum, includes the right to be adequately notified of charges or proceedings and the opportunity to be heard and present evidence at these proceedings.³² For reasons previously elaborated, the Petitioner has been deprived of meaningful notice and its right to be heard and present evidence rendered ineffective as a consequence of USAC's five-year delay.³³ Under the circumstances described herein, USAC's belated attempt to back-bill denies Petitioner its rights to due process and must fail.

F. Permitting USAC to Belatedly True-up Petitioner's 2003 Contribution Undercuts the Purpose of the Annual True-up Process

Under the Commission's rules, a USF contributor must quarterly file FCC Form 499-Qs to determine its USF contributions, subject to an annual true-up based on its annual FCC Form 499-A.³⁴ The reason for the annual adjustment is to allow carriers to regularly determine their actual USF obligations and plan accordingly.

³² The right to due process is essentially based on the concept of "fundamental fairness."

³³ Due process affords parties the opportunity to be heard and to present evidence against an opposing party. *Gray v. Netherland*, 518 U.S. 152, 181-82 (1996). ("Due process demands an opportunity to be heard 'at a meaningful time and in a meaningful manner.' The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them...Due process requires a 'full, fair, potentially effective opportunity' to defend against charges levied.") (internal cite omitted).

³⁴ *In the Matter of Federal-State Joint Board on Universal Service*, 19 F.C.C.R. 13580, 13582 (2004) ("The purpose of the annual true-up process is to ensure that interstate telecommunications providers contribute appropriate amounts to the universal service mechanisms.").

Petitioner met its obligations and timely filed its FCC Forms for the 2003 contribution period. In 2004, USAC conducted its annual true-up to determine whether or not any adjustments were needed. In accordance with its 2004 true-up, USAC invoiced Petitioner over [REDACTED] for the 2003 contribution period, which the Petitioner timely and fully paid. The current assessment represents an unauthorized recalculation of Petitioner's contribution liability based upon its original 2003 revenue data.

If permitted, USAC's conduct would undercut a fundamental objective of the true-up procedure, which is to secure voluntary compliance based on contributor reliance on the true-up mechanism. Voluntary compliance requires that contributors be able to rely upon the soundness of the true-up process to determine and settle their full obligations to contribute in a timely and efficient manner. The very purpose of an annual process is to ensure regular assessments based upon a single calendar year. USAC's attempt to recalculate Petitioner's liability after five years compromises the integrity of the program.

G. USACS Actions Are Arbitrary And Capricious In Violation of the Administrative Procedures Act

USAC's authority is limited by the Commission's oversight authority and confined by the Commission's Rules.³⁵ USAC may not "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress" and is required to seek guidance from the FCC on such matters.³⁶ Further, USAC is accountable to the Commission in its actions.³⁷ Likewise, USAC, as the administrator of the FCC, a federal agency, may not act in contravention of the laws binding the

³⁵ "The FCC retains the authority to overrule USAC's actions in administering the universal service support funds; those who are aggrieved by USAC, its committees, or its Board may seek review from the FCC." *In re InComnet v Post-Confirmation Committee of Unsecured Creditors of Incomnet Communications Corp.*, 463 F.3d 1064 (9th Cir. 2006); 47 C.F.R. § 54.702.

³⁶ 47 C.F.R. § 54.702.

³⁷ Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 F.C.C.R. 25,058, 25,067 (1998).

FCC.³⁸

The Administrative Procedures Act (“APA”) prohibits the FCC from acting in an arbitrary and capricious manner and, *a fortiori*, so restricts USAC.³⁹ USAC’s conduct finds no support in the 1934 Communications Act, the Telecommunications Act of 1996, the Commission’s rules or the Commission’s policies as articulated through various orders and decisions. As previously discussed, USAC’s assessment contradicts the Communications Act, the Commission’s document retention policies, notions of fundamental fairness and due process and principles of equity. Violation of an agency’s own rules by the agency or its agent clearly qualifies as an arbitrary and capricious act.⁴⁰ Because USAC’s conduct violates the Commission’s rules, it is unmistakably arbitrary and capricious.

H. USAC’s Assessment Violates Principles Of Equity

Basic principles of equity reject USAC’s discriminatory assessment. Specifically, equitable estoppel and laches bar USAC’s actions. Equitable estoppel prevents a party, such as Petitioner,

³⁸ See *In the Matter of 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Order (Rel. Aug. 1, 2000) (discussing USAC’s role as a data collection agent for the FCC).

³⁹ See 5 U.S.C. § 706(1)(A); *Prometheus Radio Project v F.C.C.*, 373 F.3d 372, 445 (3rd Cir. 2004) (“And, the Commission’s rules and decisions are clearly governed by the arbitrary and capricious standard. In sum, the standard of review is governed foremost by the APA’s requirement that the FCC’s rules not be arbitrary and capricious.”).

⁴⁰ If an agency does not follow the unambiguous language of its own rules, we must consider its actions arbitrary and capricious. *Myers v State*, 169 S.W.3d 731, 734 (Tex. App. 2005) (citing *Rodriguez v Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999)); It is well settled that the failure of an agency to comply with its own rules and procedures is arbitrary and capricious, and a determination made in violation of such procedures will be reversed by the Courts. *Hall v Van Amerongen*, 2008 WL 5501022 (Table) (N.Y.Sup.) (citing *Frick v Bahaui*, 56 N.Y.2d 777 (1982)).

from suffering an injury as a result of justifiable reliance on another's conduct.⁴¹ The doctrine precludes a party from recovering where another is damaged by its acts or omissions.

Petitioner relied upon the validity of USAC's initial assessments, rightfully determining that they represented Petitioner's entire 2003 USF liability. USAC's 2009 assessment is based upon its alleged miscalculation of Petitioner's 2003 USF liability. Petitioner did not contribute to the miscalculation. Rather, the miscalculation resulted entirely from USAC's mistake. Equitable estoppel prevents USAC from ignoring responsibility for the mistake to Petitioner's detriment. Likewise, the doctrine precludes USAC from denying the application of the three-year document retention policy upon which Petitioner reasonably relied. Based upon the Commission's three-year document retention policy, Petitioner reasonably determined that documentation supporting these calculations could be properly discarded after three years as Petitioner would no longer be required to justify or defend its compliance. Petitioner's justifiable reliance on established FCC policy and USAC's own actions prevents USAC's inequitable assessment.

Laches likewise operates to dispositively preclude USAC's actions. The doctrine of laches prevents a party from asserting a right against another after an unreasonable delay.⁴² Obviously, given the Federal SOL's four-year limitation period, the five years it took for USAC to act is unreasonable. And, such a lengthy delay would harm any party that, like Petitioner, acted on the reasonable premise that it had acquitted its obligations in 2004.⁴³

⁴¹ *Data Computer Corp. v. United States*, 80 Fed. Cl. 606, 614 (2008); *LaMirage, Inc. v. United States*, 44 Fed. Cl. 192, 200 (1999) (citing *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984)).

⁴² *Western Union International, Inc., Memorandum Opinion and Order*, 70 FCC 2d 1896, 1903, P36 (1979); see also, *Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243 (8th Cir. 1987) (laches may apply when the delay in bringing suit is the fault of an administrative agency).

⁴³ Compare the Supreme Court's discussion relating to the principles underlying limitations periods,

... limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation.

IV. WAIVER

In an excess of caution and in the attempt to avoid needless costs and collateral procedural issues, Petitioner requests a waiver of the rules requiring contributors to first dispute USAC's assessments with USAC. The FCC's rules mandate a contributor first address its disputes regarding contribution obligations to USAC in the form of an appeal.⁴⁴ The appeal must be filed with USAC within 60 days of the issuance of USAC's assessment decision.⁴⁵

The Commission may grant a waiver of its rules or policies if the purpose of the rules would be frustrated by application of the rules to the instant case or that application of the rules would be inequitable, unduly burdensome, contrary to the public interest, or the applicant has no reasonable alternative.⁴⁶ Because USAC's claim is barred as a matter of law, contravenes constitutional guarantees, violates established legal doctrines and undercuts the important government policy of enforcing the law in ways most conducive, whenever possible, to ensuring voluntary compliance and respect to the even-handed administration of the law, justice can only be served by waiving the need to first appeal USAC's assessment to USAC, the very entity that necessitated this filing. Requiring an appeal to USAC would only delay the process as an initial appeal to USAC would prove futile.⁴⁷

V. RELATED RULES

Petitioner submits that the present circumstances prevent the application of the "pay first, then dispute rule." The law rejects the imposition of any obligation to pay a bill that has been legally

They stimulate activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together. *Wood v Carpenter*, 101 U.S. 135, 139 (1879) and quoted in *Cole v Kelley*, 438 F.Supp. 129, 145 (C.D. Ca. 1977).

⁴⁴ See USAC Rules of Appeal, available at: <http://www.usac.org/fund-administration/contributors/file-appeal/>

⁴⁵ 47 C.F.R. § 54.720.

⁴⁶ *Id.*

⁴⁷ 47 C.F.R. § 1.925.

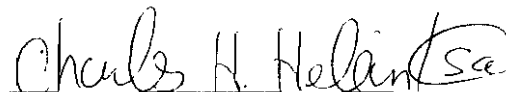
abrogated. Enforcement of such a rule under these circumstances would only further violate Petitioner's legal and constitutional rights. For the same reason, the so-called "red-light" provisions of the Debt Collection Improvement Act ("DCIA"), by which agency actions may be withheld until debts to the government have been retired, can have no application here. Notwithstanding, Petitioner reserves the right to fully address any penalty, administrative fee or interest assessment imposed pursuant to these rules.

VI. CONCLUSION

The foregoing premises considered, the Commission is requested to grant this Petition and declare the January 23, 2009 claim of USAC barred as a matter of law under the Federal SOL; to issue such further orders as deemed appropriate to provide official direction on the related issues raised by USAC's conduct as identified in this Petition; and to declare the issues of prior appeal to USAC, and of the pay first rule and the red-light rule moot and inapplicable.

Respectfully submitted,
InContact, Inc.

By



Charles H. Helein
Jonathan S. Marashlian
Jackie R. Hankins
Helein & Marashlian, LLC
Its Attorneys

April 13, 2009

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)

inContact, Inc.)
)

Form 499 Filer ID No. 818114)
)

Petition for Special Relief and Waiver)
_____)

DECLARATION OF PAUL JARMAN

I, Paul Jarman, CEO for inContact, Inc., have read and understand the contents of inContact, Inc. Form 499 Filer ID No. 818114 Petition for Special Relief and Waiver and the associated Exhibits.

I declare under penalty of Perjury that the factual matters stated therein are true and accurate.

Executed in Midvale, Utah on April 7, 2009.

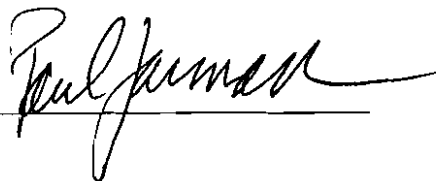


Exhibit A

USAC Invoices From July Through September 2004

REDACTED

USAC

Universal Service Administrative Company

Statement Date: 07/22/2004
 Invoice Number: [REDACTED]
 Filer 499 ID: 818114
 Balance Due USAC: [REDACTED]
 Amount Enclosed: [REDACTED]

Buyers United, Inc.
 13751 S. Wadsworth Park Dr., Suite 200
 Draper, UT, 84020
 Attention: Stephanie Sorensen

Mail Payment To:

Universal Service Administrative Company
 1259 Paysphere Circle
 Chicago, IL 60674

Address Change? See reverse side for instructions.

☐ If paying for multiple Filer 499 IDs, please check here and complete form on back.

Send top portion of statement with payment in enclosed envelope. Keep bottom portion for your records.

STATEMENT OF ACCOUNT

Date	Description	Charges	Credits
	Previous Balance	[REDACTED]	
07/15/2004	High Cost Support Mechanism Charges	[REDACTED]	
07/13/2004	Payment		[REDACTED]
07/15/2004	Low Income Support Mechanism Charges	[REDACTED]	
07/15/2004	High Cost Support Mechanism Adjustment	[REDACTED]	
07/15/2004	Low Income Support Mechanism Adjustment	[REDACTED]	
07/15/2004	Rural Health Care Support Mechanism Adjustment	[REDACTED]	
07/15/2004	Rural Health Care Support Mechanism Charges	[REDACTED]	
07/15/2004	Schools & Libraries Support Mechanism Adjustment	[REDACTED]	
07/15/2004	Schools & Libraries Support Mechanism Charges	[REDACTED]	
	BALANCE DUE USAC ON 08/13/2004	[REDACTED]	

Transactions occurring after 07/15/2004 are not reflected on this statement.

Statement Date 07/22/2004	Invoice Number [REDACTED]	Filer 499 ID 818114	Balance Due USAC [REDACTED]
FORM 499Q DATA This month's support mechanism charges were calculated using an FCC contribution factor of 0.089000 and the following revenue data: May 2004 499Q 120b [REDACTED] 120c [REDACTED]		PAYMENT INFORMATION Payment must be received by 08/13/2004 to avoid late payment charges. Please remit ACH payments in a CCD+ format to ABA #071000505, [REDACTED] Please also include your Company Name, Filer 499 ID, and Invoice Number.	
If the figures do not correspond with your records, please contact the 499 Data Collection Agent.			

REDACTED

USAC

Universal Service Administrative Company

Statement Date: 08/20/2004
 Invoice Number: [REDACTED]
 Filer 499 ID: 818114
 Balance Due USAC: [REDACTED]
 Amount Enclosed: [REDACTED]

Buyers United, Inc
 13751 S. Wadsworth Park Dr., Suite 200
 Draper, UT, 84020
 Attention: Michelle Mills

Mail Payment To:

Universal Service Administrative Company
 1259 Paysphere Circle
 Chicago, IL 60674

Address Change? See reverse side for instructions.

☐ If paying for multiple Filer 499 IDs, please check here and complete form on back.

Send top portion of statement with payment in enclosed envelope. Keep bottom portion for your records.

STATEMENT OF ACCOUNT

Date	Description	Charges	Credits
	Previous Balance	[REDACTED]	
08/13/2004	Schools & Libraries Support Mechanism Charges	[REDACTED]	
08/13/2004	Low Income Support Mechanism Charges	[REDACTED]	
08/13/2004	Low Income Support Mechanism Adjustment	[REDACTED]	
08/13/2004	High Cost Support Mechanism Adjustment	[REDACTED]	
08/13/2004	Rural Health Care Support Mechanism Charges	[REDACTED]	
08/13/2004	Rural Health Care Support Mechanism Adjustment	[REDACTED]	
08/13/2004	Schools & Libraries Support Mechanism Adjustment	[REDACTED]	
08/13/2004	High Cost Support Mechanism Charges	[REDACTED]	
08/13/2004	Payment		[REDACTED]
	BALANCE DUE USAC ON 09/15/2004	[REDACTED]	

Transactions occurring after 08/13/2004 are not reflected on this statement.

Statement Date 08/20/2004	Invoice Number [REDACTED]	Filer 499 ID 818114	Balance Due USAC [REDACTED]
FORM 499Q DATA This month's support mechanism charges were calculated using an FCC contribution factor of 0.089000 and the following revenue data: May 2004 499Q 120b [REDACTED] 120c [REDACTED]		PAYMENT INFORMATION Payment must be received by 09/15/2004 to avoid late payment charges. Please remit ACH payments in a CCD+ format to ABA #071000505, [REDACTED] Please also include your Company Name, Filer 499 ID, and Invoice Number.	
If the figures do not correspond with your records, please contact the 499 Data Collection Agent.			

REDACTED

USAC

Universal Service Administrative Company

Statement Date: 09/22/2004
 Invoice Number: [REDACTED]
 Filer 499 ID: 818114
 Balance Due USAC: [REDACTED]
 Amount Enclosed: [REDACTED]

Buyers United, Inc.
 13751 S. Wadsworth Park Dr., Suite 200
 Draper, UT, 84020
 Attention: Stephanie Sorensen

Mail Payment To:

Universal Service Administrative Company
 1259 Paysphere Circle
 Chicago, IL 60674

Address Change? See reverse side for instructions.

☐ If paying for multiple Filer 499 IDs, please check here and complete form on back.

Send top portion of statement with payment in enclosed envelope. Keep bottom portion for your records.

STATEMENT OF ACCOUNT

Date	Description	Charges	Credits
	Previous Balance	[REDACTED]	
09/15/2004	High Cost Support Mechanism Charges	\$ [REDACTED]	
09/13/2004	Payment		[REDACTED]
09/15/2004	Low Income Support Mechanism Charges	[REDACTED]	
09/15/2004	Low Income Support Mechanism Adjustment	\$42,100	
09/15/2004	High Cost Support Mechanism Adjustment	[REDACTED]	
09/15/2004	Rural Health Care Support Mechanism Charges	[REDACTED]	
09/15/2004	Rural Health Care Support Mechanism Adjustment	[REDACTED]	
09/15/2004	Schools & Libraries Support Mechanism Adjustment	\$ [REDACTED]	
09/15/2004	Schools & Libraries Support Mechanism Charges	[REDACTED]	
	BALANCE DUE USAC ON 10/15/2004	[REDACTED]	

Transactions occurring after 09/15/2004 are not reflected on this statement.

Statement Date	Invoice Number	Filer 499 ID	Balance Due USAC
09/22/2004	[REDACTED]	818114	[REDACTED]
FORM 499Q DATA		PAYMENT INFORMATION	
This month's support mechanism charges were calculated using an FCC contribution factor of 0.089000 and the following revenue data:		Payment must be received by 10/15/2004 to avoid late payment charges	
May 2004 499Q		Please remit ACH payments in a CCD+ format to ABA #071600505.	
120b	[REDACTED]	[REDACTED]	
120c	\$ [REDACTED]	[REDACTED]	
If the figures do not correspond with your records, please contact the 499 Data Collection Agent.		Please also include your Company Name, Filer 499 ID, and Invoice Number	